No. 12962

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and ELEUTERIA BROWN ARENAS, also known as DELLA NICHOLSON,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK, and DAVID D. SALLEE,

Appellees.

Reply Brief for Appellees John W. Preston, Oliver O. Clark and David D. Sallee.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED.

STATUTES

TEXTBOOKS

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Opinion Below.

The opinion below appears at pages 40-45 of the Transcript of Record. It is not reported.

The opinion of this Court on a former appeal of this proceeding for attorneys' fees and expenses of suit is reported in *United States and Eleuteria Brown Arenas v. John W. Preston, et al.,* 181 F. 2d 69. The opinion of this Court in the companion case of *United States and Lee Arenas v. John W. Preston, et al.,* is reported in 181 F. 2d 62, and is pertinent here since it disposed of similar issues.

Jurisdiction.

The district court had jurisdiction of the suit out of which this action arose under the Act of August 15, 1894, 28 Stat. 286-305, as amended, 25 U. S. C. A., Section 345.

This Court has jurisdiction on appeal under 28 U. S. C. A., Section 1291.

Questions Presented.

The questions presented on this appeal are:

1. Whether this Court should disregard the law of the case as decided in *United States et al. v. John W. Preston, et al.*, 181 F. 2d 69, and in *United States et al. v. John W. Preston, et al.*, 181 F. 2d 62.

2. Whether the district court complied with the instructions of this Court on remand of the case on the former appeal.

3. Whether the district court erred in fixing appellees' attorneys' fees in the gross amount of Twenty Five Thousand Seven Hundred and Fifty Dollars ($25,750.00).

Statutes Involved.

The statutes involved are the Act of August 15, 1894, 28 Stat. 286-305, and the amendatory Act of February 6, 1901, 31 Stat. 760, 25 U. S. C. A., Section 345, a copy of which is set forth in appellants' opening brief.

Statement.

The judgment below allowed appellees attorneys' fees in the gross amount of $25,750.00 for services rendered to Eleuteria Brown Arenas, also known as Della Nicholson, in an action brought in the district court to determine her right to an allotment of lands in severalty, selected by her for allotment, and a trust patent thereto [R. pp. 53-57], said action being No. 6221-PH-Civil, entitled "Eleuteria Brown Arenas, also known as Della Nicholson, plaintiff, v. United States of America, defendant." The judgment in said action adjudged and decreed that Eleuteria Brown Arenas was, on May 9, 1927, and at all times thereafter, entitled to a trust patent to lands, selected by her for allotment, situated in Riverside County, California, on the Reservation of the Agua Caliente Band of Mission Indians, consisting of three parcels described as follows:

PARCEL (a) Homesite: Lot 50, Section 14, Township 4 South, Range 4 East S.B.M., comprising two (2) acres;

PARCEL (b) Irrigated: Tract No. 41, of Section 26, Township 4 South, Range 4 East S.B.M., comprising five (5) acres;

PARCEL (c) Desert: SW¼ of NE¼ in Section 26, Township 4 South, Range 4 East S.B.M., comprising forty (40) acres.

Said judgment became final, after the United States abandoned its appeal therefrom.

Thereafter appellees filed a petition in said action No. 6221-PH-Civil for a supplemental decree allowing them attorneys' fees and expenses of suit for the services ren-

dered by them on behalf of the plaintiff therein, Eleuteria Brown Arenas. Following hearing of said petition, the district court rendered judgment in favor of appellees (1) allowing them an amount equal to 12½% of the value of the lands judicially allotted to her, and $100 for expenses of suit; (2) impressing an equitable lien on said lands to secure payment of the amount so allowed; and (3) ordered said lands sold, and the proceeds of sale divided, 87½% to Eleuteria Brown Arenas and 12½% to appellees.

On appeal from said judgment, this Court held (*Arenas v. Preston,* 181 F. 2d 62, *et seq.*): that the trial court erred in fixing the attorneys' fees on a percentage basis; and that the court "should have proceeded expressly to fix the dollar value of the services performed" and "should have considered and determined the value of the thing secured by the litigation, namely, the reasonable value of the Indian's interest in the allotted land under the trust patent, as one of the elements to be taken into consideration." (*Id.* p. 67.) The Court then stated:

> "The case is remanded to the district court with instructions to determine the sum of money for which amount the lien against the allotted property is to be impressed. Upon such determination having been made and upon the lien having been accordingly impressed upon the property the judgment shall stand affirmed, except as to proper assignments of error which may be claimed to have occurred in the determination herein ordered."

The judgment of this Court followed almost *verbatim* the above quoted language from the former opinion herein.

On remand both appellants and appellees offered, and the Court admitted, evidence concerning the money value

of the allotted lands. There is sharp conflict in this evidence.

Appellees offered, and the Court admitted evidence as to the money value of the legal services rendered by them for and on behalf of Eleuteria Brown Arenas in action No. 6221-PH-Civil. *Appellants offered no evidence whatever concerning the value of said legal services.*

It is proper to note in this connection that the reasonable value of the Indian's interest in the allotted lands was only "one of the elements to be taken into consideration" by the trial court in fixing the money value of appellees' legal services. (*Arenas v. Preston,* 181 F. 2d 62, at p. 67.)

At the time appellees were working on the *Eleuteria Brown Arenas* case, and even prior to the filing thereof, they were also working on the *Lee Arenas* case. In many respects the work on one was parallel to the work done on the other. The value of the parallel service is in no wise diminished by that fact.

The Court made and entered findings of fact and conclusions of law [R. pp. 45-52], and rendered judgment thereon [R. pp. 53-57] in accordance therewith.

In its findings the trial court found, among other facts, the following:

> "That the reasonable value of plaintiff's interest and estate in the allotted lands, under the trust patent decreed to the plaintiff by this court, is as follows:
>
> | | |
> |---|---|
> | Parcel (a) Homesite * * * 2 acres | $ 40,000.00 |
> | Parcel (b) Irrigated * * * 5 acres | 66,000.00 |
> | Parcel (c) Desert * * * 40 acres | 60,000.00 |
> | Total value of said parcels | $166,000.00" |

[Finding VI, R. pp. 48-49.]

The trial court further found:

> "That petitioners (appellees) * * * rendered and performed legal services for and on behalf of, and at the request of, and by agreement with the plaintiff * * * for which said petitioners are entitled to receive as compensation the sum of * * * ($25,750.00), said amount being the reasonable value of said legal services." [Finding VII, R. p. 49.]

The Court also found that "it is reasonable and equitable that * * * petitioners be secured by an equitable lien on all of the allotted lands," and that "plaintiff be allowed a period of six (6) months from the date of the entry of the supplementary decree * * * within which to pay" the judgment. [R. pp. 49-50, Findings VII and VIII.]

Judgment was entered accordingly [R. pp. 53-57], from which appellants have appealed to this Court. [R. p. 58.]

Summary of Argument.

1. Appellants are not entitled to a review of the law of the case as announced in *Arenas v. Preston,* 181 F. 2d 69, and in the companion case of *Arenas v. Preston,* 181 F. 2d 62.

In the former appeals of the cases mentioned the law was thoroughly briefed by appellants and appellees. Appellants' opening brief in the *Lee Arenas* case consisted of 49 printed pages, of which approximately 25 pages were devoted to the discussion of matters pertaining to jurisdiction. Appellees filed a reply brief consisting of 25 pages, of which about 14 pages were devoted to jurisdiction. This Court decided that, under the rule announced in *United States v. Equitable Trust Co.,* 283

U. S. 738, the district court had jurisdiction to grant the relief prayed for in action No. 6221-PH-Civil and in the supplementary proceeding for allowance of attorneys' fees. Thereupon appellants filed petition for certiorari in the Supreme Court of the United States, again devoting the principal portion of their argument to the question of jurisdiction. The Supreme Court denied certiorari.

Thus, the question of jurisdiction has had full consideration by this Court and by the Supreme Court. No good purpose could be served by a reconsideration of the law of the case, nor would reconsideration be in the interests of justice. About 12 years have elapsed since the *Lee Arenas* case was filed, and about 5 years have elapsed since the *Eleuteria Brown Arenas* case was filed. The United States has made an endurance contest out of each of said cases, and persists in a course of unjustified delaying tactics irrespective of the decisions of this Court and the Supreme Court. It certainly should not be permitted to reopen these cases for many years of further litigation. This is especially true, since the original cases were made necessary because of the wilful refusal of the Secretary to issue trust patents to allottees who had duly made selections for allotments in severalty.

2. The district court complied fully with this Court's instructions concerning further proceedings on remand of the cause. The record shows that both appellants and appellees introduced evidence as to the money value of the allotted lands, that the trial court made findings as to such values, and that the value of the land so found was

considered in the making and entering of judgment. The record also shows that the dollar value of appellees' legal services was fixed by the trial court, as directed by this Court. The record further shows that appellants offered no evidence as to the value of appellees' legal services.

3. The district court did not err in fixing the money value of appellees' legal services at $25,750.00. The only evidence introduced on such value, other than that of appellees, was that of L. R. Martineau, Jr., a well-known and highly esteemed member of the Los Angeles Bar. Mr. Martineau testified that if it be assumed that the allotted lands had a market value of $300,000.00, the reasonable value of the legal services rendered would be $75,000.00; if the lands were valued at $200,000.00, the value of such services would be $55,000.00; if the lands were valued at $100,000.00, the fee should be $30,000.00. [R. p. 97.] On cross-examination by government counsel the witness testified that if the lands were valued at $41,000.00, the attorneys' fee should be $20,000.00; if valued at $30,000.00, the fee should be $20,000.00 to $25,000.00 on a contingent basis. [R. pp. 150-152.]

There was ample evidence to sustain the trial court's finding that "the reasonable value of plaintiff's interest and estate in the allotted lands" is $166,000.00. Counsel fees of $25,750.00, for the services rendered and on the basis of such valuation and other elements considered are reasonable, and within or below the value of appellees' services as testified to by Mr. Martineau. The fee allowed is approximately 15% of the value of the allotted lands fixed by the decree of the Court.

ARGUMENT.

I.

Appellants Are Not Entitled to a Review of the Law of the Case as Announced in Arenas v. Preston, 181 F. 2d 69, and in the Companion Case of Arenas v. Preston, 181 F. 2d 62.

Appellants are now contending that this Court should review its former decisions in this case and in the companion case holding that an equitable lien may properly be impressed upon the lands allotted to Eleuteria Brown Arenas to secure the payment of the judgment rendered herein. Such contention is contrary to the rule, commonly called "rule of the case," which forecloses such a review.

It is well settled in California that

> "when the precise question before the court has been decided in a former appeal in the same action and under substantially the same state of facts, the parties are estopped from again litigating this question in any subsequent proceeding either before the trial or appellate courts." (*Penziner v. West American Finance Co.,* 10 Cal. 2d 160, 169.)
>
> 2 Cal. Jur. 946, 947, citing scores of cases decided by the California Supreme Court.

This is also the general rule announced by the federal courts.

> *United States v. U. S. Smelting etc. Co.,* 339 U. S. 186, 198, 70 S. Ct. 537, 544;
>
> *Insurance Group Com. v. Denver & R. G. W. R. Co.,* 329 U. S. 607, 67 S. Ct. 583, 585;
>
> *Messinger v. Anderson,* 225 U. S. 436, 444, 32 S. Ct. 739, 740.

> "The rule of the law of the case is a rule of practice, based upon the sound policy that when an issue is once litigated and decided, that should end the matter." (*United States v. U. S. Smelting etc. Co.*, 339 U. S. 186, 198.)

The issue whether the district court has jurisdiction to impress an equitable lien upon restricted allotted lands was squarely presented in the first trial and first appeal of this proceeding for allowance of fees The trial court and this Court held that such jurisdiction existed. The Supreme Court denied certiorari. It is to be presumed that when a question of jurisdiction is presented to the Supreme Court in a petition for certiorari, that Court would give the jurisdictional question adequate consideration. It cannot be doubted that if this Court or the Supreme Court, on the former appeal, had entertained any doubt as to the jurisdiction of the district court to impress an equitable lien upon restricted Indian lands, under the facts shown, the decisions thereof would have been different.

Appellants suggest that appellees should be required to ask Congress, or the Executive Department, to make some provision for the payment of their fees. The suggestion is cynical and derisive, considering the history of the two *Arenas* cases. The Executive Department, particularly the Interior Department, has in the past hindered in every way possible the making of allotments to the members of the Palm Springs Band of Mission Indians; and it seems now determined to defeat the just claims for compensation of attorneys who, for nearly twelve years, have labored to secure such allotments.

It has been 34 years since Congress directed the Secretary to make allotments to these Indians. The will of

Congress was thwarted for nearly thirty years, and doubtless would have continued to be set at naught if appellees had not rendered their legal services in the suits mentioned to secure justice for the Indians. Frankly, appellees have no slightest desire to be placed at the mercy and caprice of officers who have shown utter callousness and indifference to the rights of appellees' clients.

Moreover, the judgment rendered stands affirmed when and if the proceedings on remand comply with the instructions of this Court. (*Arenas v. Preston,* 181 F. 2d 62, 68.)

II.

The District Court Complied Fully With This Court's Instructions Concerning Further Proceedings on Remand and Retrial of the Cause.

Appellants assert that the trial court acted contrary to this Court's instructions in the matter of valuing the interest of Eleuteria Brown Arenas in the lands judicially allotted to her. The basis of this assertion is that her "interest" in said lands is almost negligible because of the restrictions inherent in a trust patent. The evidence of appellants' expert witnesses was based upon assumptions that restrictions against alienation and leasing reduced the value of the Indian's interest in the restricted lands to a small fraction of their real value. No such measure of valuation is permissible.

The contention of appellants raises the question of what is the interest and estate of an Indian allottee under a trust patent. Such interest and estate is suggested in marginal note 5 found in the opinion of this Court in

Arenas v. Preston, 181 F. 2d 62, at pages 64 and 65, epitomized below:

> "The restraint on alienation must not be exaggerated. It does not of itself debase the right below a fee simple * * * The land is not the land of the United States, and timber when cut did not become the property of the United States." (*United States v. Paine Lumber Co.,* 206 U. S. 467, 473, 27 S. Ct. 697, 699.)
>
> "The virtual fee is in the allottee, with certain restrictions on the right of alienation." (*United States v. Minnesota,* 113 F. 2d 770, 773; *United States v. Oklahoma G & E Co.,* 127 F. 2d 349.)
>
> "Through an allotment, the Indian allottee acquired an equitable title to the land. While the Government retains the legal title in trust for the Indian, the title of the Indian, except for the limitation against alienation, is, in reality, a title in fee simple." (*Eastman v. United States,* 28 Fed. Supp. 807, 808.)

In Cohen's Handbook of Federal Indian Law, pages 320-322, the author discusses restraints on alienation from a tribal standpoint, and the value of Indian lands in view of such restraints. The discussion is of equal pertinence in respect to the value of the allotted lands subject to restrictions of the kind here involved. It is said in the text, *id.* page 321:

> "If 'Indian title' is something less than a fee simple, then in cases of involuntary alienation damages should be based upon something less than the value of the

land itself. *Yet the courts hold that in such cases the value of the land is the measure of damages.*" (Emphasis added.) Citing:

United States v. Shoshone Tribe, 304 U. S. 111, 116, 58 S. Ct. 794, 797;

Leavenworth, L & G R. R. v. United States, 92 U. S. 733, 742, 23 L. Ed. 634;

Beecher v. Weatherby, 95 U. S. 517, 525, 24 L. Ed. 440.

United States v. Shoshone Tribe of Indians, 304 U. S. 111, 58 S. Ct. 794, is in point. The Tribe sued the United States to recover the value of certain reservation lands taken by the United States without the consent of the Tribe for use by a band of Arapahoe Indians. The United States contended that the Shoshones' right of use and occupancy did not include the ownership of timber and minerals, and asked that the judgment be reversed with "directions to determine the value of the Indians' right of use and occupancy but to exclude therefrom 'the net value of the lands' and 'the net value of any timber or minerals.'" In substance the same contention was made there, as here. The Court said, 58 S. Ct. pp. 797-798:

> "* * * the United States granted and assured to the tribe peaceable and unqualified possession of the land in perpetuity. Minerals and standing timber are constituent elements of the land itself. (Citing cases.) For all practical purposes, the tribe owned the land. Grants of land subject to the Indian title by the United States, which has only the naked fee, would transfer no beneficial interest. (Citing cases.) *The right of perpetual and exclusive occupancy of the land is not less valuable than the full title in fee.* (Citing cases.)"

The rule of value stated in the foregoing cases is equally applicable to the lands of a minor, or incompetent Indian under guardianship. The estate in land of a minor or incompetent Indian under guardianship is no less than an unconditional fee simple. The Indian's inability to convey would not debase the fee value. This is plainly indicated in *Choate v. Trapp,* 224 U. S. 665, 32 S. Ct. 565. In that case the State of Oklahoma undertook to tax the lands of about 8000 Indians, members of the Chotaw and Chickasaw Tribes, notwithstanding a treaty provision between the United States and said Tribes that such lands should not be taxable during the lives of the individual original allottees. After stating that, "while Congress had power to make treaties, it could not affect titles already granted by the treaty itself," the Court said (32 S. Ct. 570-571):

> "Nothing that was said in Tiger v. Western Invest. Co., 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578, is opposed to the same conclusion here. For that case did not involve property rights, but related solely to the power of Congress to extend the period of the Indian's disability. The statute did not attempt to take his land or any right, member, or appurtenance thereunto belonging. It left that as it was. But, having regard to the Indian's inexperience, anl desiring to protect him against himself and those who might take advantage of his incapacity, Congress extended the time during which he could not sell. On that subject, after calling attention to the fact that 'Tiger was still a ward of the Nation, so far as the alienation of these lands was concerned, and a member of the existing Creek Nation,' it was said

that 'incompetent persons, though citizens, may not have the full right to control their property,' and that there was nothing in citizenship incompatible with guardianship, or with restricting sales by Indians deemed by Congress incapable of managing their estates.

"But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the provisions of the 5th Amendment."

It thus appears that the value of an Indian's interest in allotted lands is the full value of the fee. The United States has no beneficial interest therein; it is a trustee holding naked legal title only, no more. Its interest in such lands is exactly zero so far as money value is concerned. ALL of the money value is vested in the allottee, and this is true whether he is a minor or an incompetent under guardianship.

The trial court found the money value of Eleuteria's allotment to be $166,000.00. Appellees' witness Beckley testified that the fee value thereof was $300,000.00, and their witness Gallagher testified the fee value thereof was $486,000.00. The finding of value of $166,000.00 is about one-half of Beckley's valuation, and about one-third of Gallagher's valuation. The finding is amply supported by the evidence, and the trial court committed no error.

Furthermore, the value of the allotted lands was only one of the elements to be considered in fixing the money value of appellees' services. Appellants overlook this pertinent fact of this Court's former decision.

III.

The District Court Did Not Err in Finding the Money Value of Appellees' Legal Services at $25,750.00.

The trial court found that the value of the legal services rendered by appellees for and on behalf of Eleuteria Brown Arenas, in securing a trust patent for the lands selected by her for allotment in severalty, is the sum of $25,750.00. The chief criticism of that amount by appellants is that the total amount awarded includes an item of $5,000.00 for "services rendered by petitioners in the Lee Arenas case for the benefit of" Eleuteria Brown Arenas.

The trial court found in this connection [R. p. 50]:

> "The value of the services rendered by petitioners in the Lee Arenas case for the benefit of respondent-plaintiff was $5,000, and the value of the petitioners' services rendered in the present case was $20,750.00."

The total amount awarded was fair and reasonable, considering the importance of the case, the amount involved, and the skill and labor required of appellees.

The services performed, the work done, and the time expended by appellees for the benefit of Eleuteria Brown Arenas are set forth in detail in the petition for supplemental decree for allowance of attorneys' fees and expenses of suit, and in the testimony of appellees. [See R. pp. 7-11, and pp. 186-207, 265-266, 203-210 in appeal No. 12218 in this Court.] No helpful purpose could be served by repeating the admitted allegations and said testimony. It is sufficient to say that the services rendered constitute an ample factual basis for the allowance of fees totaling $25,750.00.

In addition, L. R. Martineau, Jr., testified as an expert on the value of appellees' services [R. pp. 69-157] as follows: If the allotted lands are valued at $300,000.00, the fee should be $75,000.00; if the lands are valued at $200,000.00, the fee should be $55,000.00; and if valued at $100,000.00, the fee should be $30,000.00.

Appellants offered no testimony as to the value of appellees' legal services.

The trial court found the reasonable value of the lands in question to be $166,000.00. A fee of $25,750.00 is reasonable under the rules governing the allowance of fees in California, now noted.

In *Berry v. Chaplin,* 74 Cal. App. 2d 669, 679, the Court stated the various elements to be considered in fixing an attorney's fee on a *quantum meruit* basis as follows:

> "Among the factors to be considered in determining what constitutes a reasonable compensation for an attorney who has rendered services in connection with a legal proceeding are the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age, and his experience in the particular type of work demanded (*City of Los Angeles v. Los Angeles-Inyo Farms Co.,* 134 Cal. App. 268, 276 (25 P. 2d 224)); the intricacies and importance of the litigation, the labor and the necessity for skilled legal training and ability in trying the cause, and the time consumed. (*Palm Springs etc. Co. v. Kieberk Corp.,* 46 Cal. App. 2d 234, 241 (115 P. 2d 548); *Collins v. Welsh,* 2 Cal. App. 2d 103, 110 (37 P. 2d 505).)"

In *Sampsell v. Monell,* 162 F. 2d 4, opinion by Judge Stephens, this Court stated the elements to be considered in determining the amount of an attorney's fee as follows (*id.* p. 6):

> "As stated by the referee, attorney's services cannot be measured with any degree of mathematical certainty. Here we are left only with a measure termed 'reasonable.' The elements in determining a proper fee for an attorney have been summed up in an opinion by Judge Woolsey *in re* Osofsky, D. C., 50 F. 2d 925, 927:
>
> " '(1) The time which has fairly and properly to be used in dealing with the case; because this represents the amount of work necessary. (2) The quality of skill which the situation facing the attorney demanded. (3) The skill employed in meeting that situation. (4) The amount involved; because that determines the risk of the client and the commensurate responsibility of the lawyer. (5) The result of the case, because that determines the real benefit to the client. (6) The eminence of the lawyer at the bar, or in the specialty in which he may be practicing.
>
> " 'Each case, of course, differs to some extent from every other case in respect of the importance of these several elements.' "

Other authorities to the same effect are: *Palm Springs etc. Co. v. Kieberk Corp.,* 46 Cal. App. 2d 234, 241; *Collins v. Welsh,* 2 Cal. App. 2d 103, 110; *Matthieson v. Smith,* 16 Cal. App. 2d 479, 483; *Los Angeles v. Los Angeles-Inyo Farms Co.,* 134 Cal. App. 268, 276; 3 Cal. Jur. 608, and many more.

The record shows that several years before suit for trust patent was filed on behalf of Eleuteria Brown Arenas she had conferences with appellees Clark and Sallee in respect to employing them to represent her in such suit; that a written contract of employment was then prepared but not executed; that in 1944 she agreed to the employment of appellees including appellee Preston, and that a written contract on a *quantum meruit* basis was then executed by her; that she agreed to pay for any and all services beneficial to her rendered by appellees in the *Lee Arenas* case. [R. pp. 127-128, former appeal No. 12218, and Exhibit 2 therein.] In this connection Oliver O. Clark testified, on cross-examination by Mr. Brett *(id.)*:

> "Q. Was any writing ever executed by Della Arenas in which there was mention made of her paying either in money or as a part of her allotment for the services to be rendered by you and your associates, including Judge Preston, in the Lee Arenas case? A. Yes, the contract, which is in evidence here, expressly covers all litigation and all matters in and out of court having to do with her obtaining an allotment. It was not limited to a contract with her to the determination of her eligibility.
>
> Q. You are referring now to Exhibit 2? A. Right."

Eleuteria benefited directly from the Lee Arenas litigation, in which the right of every member of the Agua Caliente Band to an allotment in severalty and a trust patent thereto was established. She agreed to pay for any and all legal services beneficial to her rendered by appellees. She is directly liable on the *quantum meruit*

contract. The sum of $5,000.00 for services beneficial to her, prior to the suit filed in her behalf, for which she expressly agreed to pay, is fair and reasonable. The trial court did not err in including that sum in the total amount awarded appellees for their services in her behalf.

Finally, and without conceding any error in the inclusion of said sum of $5,000.00 in the amount awarded appellees, it should be noted that, even if it was error, this Court could reduce the judgment by the amount of $5,000.00 and no reversal of the judgment would be necessary.

Conclusion.

For the reasons hereinabove stated, the judgment should be affirmed.

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Attorneys for Appellees.